

# United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Samuel Der-Yeghiayan	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	03 C 115	DATE	8/25/2004
CASE TITLE	Cheers vs. Potter		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

## MOTION:

## DOCKET ENTRY:

- (1) ☐ Filed motion of [ use listing in "Motion" box above.]
- (2) ☐ Brief in support of motion due \_\_\_\_\_.
- (3) ☐ Answer brief to motion due \_\_\_\_\_. Reply to answer brief due \_\_\_\_\_.
- (4) ☐ Ruling/Hearing on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (5) ☐ Status hearing[held/continued to] [set for/re-set for] on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (7) ☐ Trial[set for/re-set for] on \_\_\_\_\_ at \_\_\_\_\_.
- (8) ☐ [Bench/Jury trial] [Hearing] held/continued to \_\_\_\_\_ at \_\_\_\_\_.
- (9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]  
☐ FRCP4(m) ☐ Local Rule 41.1 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).
- (10) ☒ [Other docket entry] Status hearing held. For the reasons stated in the attached memorandum opinion, the defendant's motion for summary judgment is granted in part and denied in part. The parties are directed to exchange proposed witness lists by 09/03/04. Motions in limine are to be filed by 09/10/04. Responses to the motions in limine, if any, are to be filed by 09/17/04 and replies, if any, are to be filed by 09/24/04. The parties are directed to submit to this Court's chambers the joint pretrial order as outlined in this Court's standing order regarding pretrial orders by 10/08/04. Copies of the Court's standing order regarding pretrial orders maybe obtained from this Court's web page or from this Court's Courtroom Deputy. Pretrial conference set for 10/13/04 at 10:30 a.m. Jury Trial set to begin on 10/18/04 at 9:30 a.m. Enter Memorandum Opinion.
- (11) ☒ [For further detail see order attached to the original minute order.]

<input type="checkbox"/> No notices required, advised in open court.	1000 JOHN'S RD 'SIN 2004 AUG 26 AM 9:08 103-02714	number of notices	Document Number 32
<input type="checkbox"/> No notices required.		AUG 26 2004	
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in the fall of 1993. Cears claims that while Rigsby was her supervisor, Rigsby raped Cears. According to Cears, in 1994 and 1995 Cears accompanied Rigsby to his apartment and had non-consensual sex with Rigsby on three or four occasions because Rigsby told her that she would lose her job if she refused. Cears also alleges that Rigsby exposed himself in front of Cears on another occasion in the spring of 1994. Cears claims that she reported the incident a week later to a manager in the Labor Relations Department named Rosemary Gray ("Gray"). According to Cears, Gray told Cears not to tell anyone about the exposure incident and to wait and see if Rigsby stopped such behavior. Cears alleges that Rigsby then began making comments of a sexual nature to her and that he would call Cears into his office and ask her to have sexual intercourse with him and would touch Cears' legs and hands. Cears claims that in 1996 Rigsby sodomized Cears in the workplace lunchroom. According to Cears, between February of 1994 and August of 1998, Rigsby sexually harassed Cears approximately twice a week in his office. Cears also alleges that in early 1997 Rigsby showed an erection to Cears, once with his pants zipped and once with his pants unzipped. Cears claims that she sent an anonymous letter to Rigsby's supervisor complaining about the harassment. According to Cears, she spoke with the secretary of Cynthia Kellogg ("Kellogg"), the Director of Human Resources, knew that Cears had sent the letter and advised Cears not to tell Kellogg. Cears claims that she did not report the harassment until mid-1998 because she was afraid of losing her job.

On June 19, 1998, Cheers filed an administrative complaint with Defendant's Equal Employment Opportunity ("EEO") office alleging that she had been sexually harassed by Rigsby. After filing her EEO complaint Cheers was transferred away from Rigsby's office. Cheers retired from employment with Defendant on February 2, 2001.

### LEGAL STANDARD

Summary judgment is appropriate when the record reveals that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In seeking a grant of summary judgment the moving party must identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). This initial burden may be satisfied by presenting specific evidence on a particular issue or by pointing out "an absence of evidence to support the non-moving party's case." *Id.* at 325. Once the movant has met this burden, the non-moving party cannot simply rest on the allegations or denials in the pleadings, but, "by affidavits or as otherwise provided for in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A "genuine issue" in the context of a motion for summary judgment is not simply a "metaphysical doubt as to the material

facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*, 475 U.S. 574, 586 (1986). Rather, a genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 599 (7th Cir. 2000). The court must consider the record as a whole, in a light most favorable to the non-moving party, and draw all reasonable inferences that favor the non-moving party. *Anderson*, 477 U.S. at 255; *Bay v. Cassens Transport Co.*, 212 F.3d 969, 972 (7th Cir. 2000).

## **DISCUSSION**

### **I. Religious Discrimination Claim**

We note initially that Chears included a discrimination claim based on religion in her complaint. Chears did not raise this claim in her complaint in the administrative proceedings and acknowledges in her answer to the instant motion, that the claim should be dismissed. (Ans. 4 n.2). Therefore, we grant Defendant’s motion for summary judgment on the religious discrimination claim.

### **II. Claims Related to Events That Occurred Prior to May 5, 1998**

Defendant argues that Chears failed to exhaust her administrative remedies in regards to the claims related to events that occurred prior to May 5, 1998. Defendant

argues that Cheers failed to comply with 29 C.F.R. § 1614.105(a) which states in part the following:

§ 1614.105 Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action. . . .

29 C.F.R. § 1614.105(a). *See also Clark v. Runyon*, 116 F.3d 275, 276, 279 (7<sup>th</sup> Cir. 1997)(affirming Magistrate court's ruling granting summary judgment for the defendant because plaintiff employee failed to contact the Postmaster General EEO Office within the 45 day limit). Cheers admits pursuant to Local Rule 56.1, that Cheers contacted the EEO office on June 19, 1998. ( R SF 3). Therefore, Cheers could only report claims relating to events that occurred on or after May 5, 1998. ( R SF 3). Cheers argues that Defendant waived the forty-five day notification requirement and that the notification period should be estopped under the doctrine of equitable estoppel. Pursuant to 29 C.F.R. § 1614.604(c) the 45 day notification time limit is "subject to waiver, estoppel and equitable tolling." 29 C.F.R. § 1614.604(c). *See also Clark*, 116 F.3d at 276 (stating that the 45 day requirement is not jurisdictional).

In support of her waiver argument, Cheers merely states in a conclusory

fashion that “[t]here is no question that each of the sexual claims raised in the present complaint were, in fact, addressed as part of the administrative process pursuant to Chapter XIV of Title 29, Code of Federal Regulations.” (Ans. 3). However, Cheers points to no evidence that would support such an assertion. To defeat a motion for summary judgment Cheers must point to some admissible evidence that the trier of fact can consider as a basis to find in Cheers favor at trial. Neither has Cheers pointed to any evidence to support her argument for equitable estoppel nor made any argument that would warrant such equitable relief. Therefore, we grant Defendant’s motion for summary judgment on the claims based on events that occurred prior to May 5, 1998.

### III. Claims Related to Events That Occurred On or After May 5, 1998

Defendant argues that, in regards to claims related to events that occurred on or after May 5, 1998, there is not sufficient evidence of sexual harassment to constitute a hostile work environment. Defendant also argues that even if the allegations are sufficient to support a hostile work environment claim, Defendant did not take a tangible employment action against Cheers and Defendant was not negligent in preventing the harassment.

#### A. Hostile Work Environment

An employer is prohibited under Title VII from maintaining a "hostile work

environment." *Cooper-Schut v. Visteon Automotive Systems*, 361 F.3d 421, 426 (7<sup>th</sup> Cir. 2004). A hostile environment is defined as an environment that is "permeated with discriminatory intimidation, ridicule and insult." *Id.* A plaintiff bringing a hostile work environment claim must establish that: "1)[s]he was subject to unwelcome harassment; 2) the harassment was based on h[er] race [or sex]; 3) the harassment was severe [or] pervasive so as to alter the conditions of the employee's environment and create a hostile or abusive working environment; and 4) there is basis for employer liability." *Id.* (quoting *Mason v. Southern Illinois University at Carbondale*, 233 F.3d 1036, 1043 (7<sup>th</sup> Cir. 2000)). Factors considered in determining whether there is a hostile work environment include: 1) the "frequency of discriminatory conduct," 2) "its severity," 3) whether conduct is "physically threatening or humiliating" or merely offensive, 4) whether conduct "unreasonably interferes with [the plaintiff's] work performance," and 5) the "social context in which events occurred." *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 463 (7<sup>th</sup> Cir. 2002).

Defendant argues that Cheers' only claims as harassment within the 45 day limit is that "Rigsby complimented Cheers' complexion and told her that she had a pretty body on two or three unknown occasions," and told her "'do you want some' or 'give me some' on two or three unknown occasions." (Reply 2). Defendant, however, is only able to make such an argument by ignoring much of the evidence presented by Cheers.

### 1. Statement of Additional Fact Number 11

Chears claims that “[b]etween February of 1994 and August of 1998, Rigsby did something that Plaintiff considered to be offensive or sexually harassing approximately twice a week in his office.” (SAF 11). Defendant does not deny Chears’ statement of additional fact number 11. Defendant’s only response is that the allegations in additional fact number 11 are immaterial because they concern events outside the pertinent 45 day limit. We do not agree. Defendant acknowledges that Chears contacted the EEO office on June 19, 1998, and Chears states expressly in additional fact number 11 that such harassment occurred between February of 1994 and August of 1998 which includes time within 45 days of June 19, 1998.

### 2. Statement of Additional Fact Number 22

Chears also claims that “[b]etween April 1, 1998, and June 19, 1998, Rigsby would consistently call her into his office and ask for sex . . . [and] would make statements such as ‘Do you want some? can I have you? am I allowed to say your body is pretty.’” (SAF 22). Defendant’s only response to statement of additional fact number 22 is that it mischaracterizes the cited deposition testimony. Defendant offers no elaboration to support its conclusory assertion regarding the mischaracterization. A review of the evidence shows that Defendant is again

mistaken. In support of additional facts number 22, Cheers cited to pages 63-66 of her deposition transcript. When asked what discrimination occurred between April 1, 1998, and June 19, 1998, although Cheers did not appear to be absolutely certain at her deposition, she indicated that she thought that during the period Rigsby called her into his office to ask for sex. (Ch Dep. 63, L5-9). Cheers also testified at her deposition that between April 1, 1998, and June 19, 1998, Rigsby told her that he “wanted” her “body,” (Ch Dep. 66, L 18), told her “Can I have you?,” (Ch Dep. 66, L 25, 65, L 11-15), and told her “your body is pretty,” (Ch Dep. 63, L19-21). Cheers also stated that during the period Rigsby told her “Do you want some?,” “Can I have you?,” and “Am I allowed to say your body is pretty?” (Ch dep. 63, 13-17).

### 3. Statement of Additional Facts Numbers 8, 9, and 10

Chears claims that up until she filed the complaint about harassment in June of 1998, Rigsby made sexual comments and touched Cheers. Cheers claims that Rigsby asked Cheers to go to a hotel with him while he rubbed against her. (SAF 8). Cheers also claims that during that period Rigsby told her he wanted to “f\_\_\_\_” her, and touched Cheers on her hands and legs. (SAF 9)(SAF 10). In response to statement of additional facts numbers 8 and 9, Defendant argues that the facts therein are immaterial because the allegations do not concern events within the pertinent 45 day limit. Cheers asserts in statement of additional facts number 10 that the

incidents asserted in statement of additional facts numbers 8 and 9 occurred up until Cears reported the harassment which includes the time within the 45 day limit. Defendant claims that such an allegation is contradicted by Cears' deposition testimony. First of all, a contradiction in Cears' deposition testimony would not automatically render Cears' cited portions of the deposition inadmissible. Secondly, Defendant failed to provided any elaboration for its objection and its cited transcript pages offer no insight into its argument.

Defendant also argues in response to additional fact number 8 that Cears' deposition testimony contradicts additional fact number 8 because Cears stated that Rigsby never touched her during the period in question. Cears alleges in additional fact number 9 that Rigsby touched her hands and legs. Cears stated in her deposition that Rigsby would try to feel her legs and would touch her hands. (Ch Dep. 31, 22-25). Defendant argues that Cears testified that Rigsby did not touch her between April 1, 1998 and June 19, 1998, and in support Defendant cites to page 70 of Cears' deposition transcript. However, there is no such testimony on page 70 or even testimony from which such a conclusion might be inferred. Thus, after we sift through the smokescreen of Defendant's meritless objections, it is clear that there is sufficient evidence of possible harassment regarding events during the 45 day limit. We find that based upon the evidence in support of plaintiff's position, Cears has shown that the harassment was sufficiently pervasive and severe to create a hostile work environment.

### B. Vicarious Liability

In accordance with the rulings in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), “[e]mployers are strictly liable for harassment inflicted by supervisors, subject to an affirmative defense when the harassment does not result in a tangible employment action.” *Williams v. Waste Management of Illinois*, 361 F.3d 1021, 1029 (7<sup>th</sup> Cir. 2004). If the employer shows that no tangible employment action was taken against the plaintiff, the plaintiff must show that the defendant “was negligent in discovering or remedying the harassment.” *Durkin v. City of Chicago*, 341 F.3d 606, 612 (7<sup>th</sup> Cir. 2003). An employer may defend against allegations of negligence by establishing: 1) “it exercised reasonable care to discover and rectify promptly any sexually harassing behavior,” *Id.*, and 2) “the plaintiff “failed to take advantage of any preventive or corrective opportunities provided by the [defendant] to otherwise avoid harm.” *Hardy v. University of Illinois at Chicago*, 328 F.3d 361, 364-66 (7<sup>th</sup> Cir. 2003). The employer need only exercise reasonable care to prevent and promptly resolve sexual harassment complaints, but the employer is not required to show that its efforts were successful. *Id.* The plaintiff must also show that the “employer had notice of sexual harassment. . . .” *Durkin*, 341 F.3d at 612; *Cooper-Schut*, 361 F.3d at 426. When an employer designates a person to accept harassment complaints, the plaintiff is expected to use that channel and to defeat a

motion for summary judgment, the plaintiff must also show that “she provided the employer with enough information so that a reasonable employer would think there was some probability that she was being sexually harassed.” *Durkin*, 341 F.3d at 612.

Defendant argues that it did not take a tangible employment action against Cheers. A tangible employment action is defined as “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Hardy*, 328 F.3d at 364(quoted *Ellerth*, 524 U.S. at 761 ). *See also Robinson v. Sappington*, 351 F.3d 317, 337 (7<sup>th</sup> Cir. 2003)(indicating that a constructive discharge may constitute a tangible employment action in some circumstances). Cheers first argues that tangible employment actions were taken against her in 1993, 1994, 1996, and 1997, but, as indicated above, such events cannot be considered due to the untimely disclosure of the events to the EEO office. The only tangible employment action claimed by Cheers that occurred on or after May 5, 2002, was that Cheers was transferred to the mail-room floor and placed on the night shift after she filed her complaint against Rigsby. (Ans. 9)(SAF 20). Defendant does not respond to this argument at all in its reply brief. The only mention of this fact is Defendant’s Local Rule 56.1 response to additional fact number 20. Defendant cited page 95 of Cheers’ administrative hearing transcript and contends that at Cheers’ administrative hearing Cheers testified that after she

complained she was transferred to window services. (Adm. Hearing 95, L 18-24). First of all, based on our review of the pages cited by Defendant, Cheers did not testify at the hearing that she was immediately transferred to window services after she complained. She merely testified that she was transferred sometime after she complained. There could have been a period in the mail-room before she was transferred to the window services. Secondly, even if she was transferred to window services immediately after she complained, Defendant has not provided any information or evidence to rebut Cheers' contention that her transfer after she filed her complaint constituted a tangible employment action. We are thus left with insufficient information to determine whether or not the transfer constituted a tangible employment action. It is possible that a transfer can constitute such an action if, for example, it involved significant alterations in responsibilities or benefits. Defendant acknowledges that a transfer occurred after Cheers filed a complaint against Rigsby. Defendant, as the movant, has the burden to establish that there are no genuine disputed material facts and any ambiguities in the facts due to Defendant's failure to address the pertinent issues must be resolved in Cheers' favor. *See Bay*, 212 F.3d at 972 (stating that for a summary judgment motion the court must make all reasonable inferences in favor of the non-movant).

Defendant cites page 50 of Cheers' deposition transcript and argues that Cheers "did not have any complaints about her transfer to the window position" to show that the transfer was not adverse. ( R SF 20). However, page 50 of the

transcript contains no such representation. Cheers merely testified that she has no complaint about the transfer because she “need[ed] to get away” from Rigsby and that she was distressed at the time and was glad that the people in her new position left her alone and did not bother her. (Ch Dep. 50). Such testimony is not sufficient to conclude that the transfer did not constitute a tangible employment action. Therefore, and in the absence of sufficient information concerning the transfer at issue we cannot conclude as a matter of law that Defendant did not take a tangible employment action against Cheers. Therefore, we cannot find that Defendant is entitled to the *Ellerth* affirmative defense and Defendant, thus deprived of such a defense, is strictly liable for the alleged harassment by Rigsby since Rigsby was Cheers’ supervisor.

### CONCLUSION

Based on the foregoing analysis, we grant Defendant’s motion for summary judgment in regards to claims based on events that occurred prior to May 5, 1998, and deny Defendant’s motion for summary judgment on claims based on events that occurred on or after May 5, 1998. We also grant Defendant’s motion for summary judgment on the religious discrimination claim.

  
Samuel Der-Yeghiayan  
United States District Court Judge

Dated: August 25, 2004